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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE: LIN 07 120 54619 Office: NEBRASKA SERVICE CENTER Date: JUL 28 2009

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to
Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of California that claims to be in the business of garment and textile import and export. The petitioner seeks to employ the beneficiary as its chief executive officer. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

The director denied the petition, concluding that the petitioner had not established that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner contends that the beneficiary's position in the United States meets the statutory requirements for classification as a multinational executive or manager. The petitioner submitted further evidence in support of its claims on appeal.

Section 203(b) of the Act states in pertinent part:

- (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

- (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job

offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. *See* 8 C.F.R. § 204.5(j)(5).

At issue in the present matter is whether the beneficiary will be employed in a primarily managerial or executive capacity by the United States entity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision making; and

- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In a letter dated March 14, 2007 submitted with the Form I-140, Immigration Petition for Alien Worker, the petitioner described the beneficiary's duties in the United States as follow:

[The beneficiary] has been on the position of CEO in [the petitioning company] since his entry of the U.S. [sic]. This position requires the candidate Plan, develop and establish policies and objectives of our U.S. subsidiary in accordance with board directives and corporation charter of our parent company:[sic] Confer with company officials to plan business objectives, to develop organizational policies to coordinate functions and operations between divisions and departments, and to establish responsibilities and procedures for attaining objectives. Review activity reports and financial statements to determine progress and status in attaining objectives and revise objectives and plans in accordance with current conditions. Direct and coordinate formulation of financial programs to provide funding for new or continuing operations to maximize returns on investments, and to increase productivity. Reviews financial statements and sales and activity reports to ensure that organization's objectives are achieved. Plan and develop industrial, labor, and public relation policies designed to improve company's image and relations with customers. Evaluate performance of executives for compliance with established policies and objectives of the company. Person in this position has authority to hire and fire executive and managerial personnel.

The petitioner stated on the Form I-140 that it has 6 employees. However, the petitioner also submitted its California State Forms DE6, Quarterly Wage and Withholding Reports, for all four quarters of 2006, which indicated that the petitioner only had five employees on its payroll during each quarter. The petitioner did not submit any description of its employees other than the beneficiary.

On May 22, 2008, the director issued a request for further evidence (RFE). In connection with the beneficiary's position in the United States, the director requested a more detailed description of the beneficiary's duties, including the specific day-to-day tasks associated with each duty and an estimate of the percentage of time the beneficiary would spend on each specific duty. The director also requested a detailed organization chart for the U.S. company that should illustrate the current structure of the company with the proposed position for the beneficiary, list the names of all departments and teams, and include the names and detailed descriptions of the job duties for the beneficiary's subordinate employees.

The petitioner responded to the RFE in a letter dated June 23, 2008, accompanied by additional evidence. In the letter, the petitioner restated the description of the beneficiary's U.S. job duties provided in the March 2007 letter and added the following:

Due to his dual functions in both the U.S. entity and the Chinese parent group company i.e. CEO of the U.S. company and a member of the Board of Directors of SHANDON D&Y TEXTILE & GARMENT GROUP (D&Y GROUP), he has been playing a critical role in planning, developing, and establishing policies and objectives of both the foreign parent company and the U.S. subsidiary. In order to fulfill his task, he has to spend about 95% of his total working hours in planning, developing, and establishing policies for both the group company and the U.S. subsidiary and about 10% working hours in administrative activities, e.g. training, hiring and firing employees of the U.S. company.

The petitioner indicated in the same letter that the beneficiary has four immediate subordinates, whose names, titles and job descriptions are as follow:

[REDACTED]¹ Direct and coordinate activities of businesses concerning purchasing textile raw material from the U.S. cotton seller and importing garment products from China; [m]anage company staff, preparing work schedules and assigning specific duties; [r]eview financial statements, sales and activity reports, and other performance data of the company in order to measure productivity to determine areas needing cost reduction and program improvement; [d]etermining staffing requirements, and interview, hire and train new employees; [m]onitor purchasing agencies to ensure that they efficiently and effectively provide needed services while staying within budgetary limits; [d]irect and coordinate organization's financial and budget activities to fund operations; [m]anage the movement of goods and product into and out of production facilities.

[REDACTED]: Interact with customers to provide information in response to inquiries about products and services and to handle and resolve complaints.

[REDACTED] Plan, direct, and coordinate accounting, investing, banking, insurance, securities, and other financial activities of a branch, office, or department of an establishment.

[REDACTED] Direct distribution of D&Y's product to the customers. Coordinate sales distribution by establishing sales territories, quotas, and goals and establish training programs for sales representatives. Analyze sales statistics gathered by staff to determine sales potential and inventory requirements and monitor the preferences of customers.

¹ The AAO notes that the name [REDACTED] does not appear on any of the California State Forms DE6 or Internal Revenue Service Forms W-2 for the year 2006 that are in the record. Although the name [REDACTED] does appear on some of those forms, there is no evidence that [REDACTED] and [REDACTED] are the same person. Thus, it is not clear based on the record that [REDACTED] was employed by the petitioner, or that the position of General Operation Manager was actually filled, at the time the petition was filed.

On the organizational chart the petitioner submitted, the beneficiary is listed as "President" at the top of the chart. The positions immediately below him are "Sales Dept." and "General Operation Manager." Listed under the General Operation Manager are the "Financial and Accounting Dept." and the "Customer Service Dept." Under "Sales Dept." are the names of three companies who are listed as distributors.

On January 28, 2008, the director denied the petition, concluding that the petitioner had not established that the beneficiary will be employed in a primarily managerial or executive capacity. Specifically, the director noted that the petitioner has used either vague statements or paraphrased statutory language to describe the beneficiary's activities. The director also noted that, based on the organizational chart of the U.S. company, the beneficiary has two direct subordinates who are not performing in a managerial capacity, despite their managerial titles. The director further found that the evidence does not show that there is a sufficiently complex or sophisticated US organization that requires the services of an executive; rather, the U.S. entity is primarily a small sales office with three support staff operating as an agent for the foreign parent.

On appeal, counsel for the petitioner contends that the beneficiary's position in the United States meets the statutory requirements for classification as a multinational executive or manager under section 203(b)(1)(C) of the Act. Counsel restates the beneficiary's job description that was provided in response to the RFE and asserts that it clearly indicates what functions the beneficiary has in the U.S. company and the percentage of time dedicated to each function. Counsel further asserts that the fact that the description uses statutory language should not be a ground for denial if the language in question clearly explains the beneficiary's responsibilities. Counsel notes the director's finding that the beneficiary's direct subordinates are not managers, but argues that the key issue is whether the beneficiary functions in an executive capacity. Counsel claims that the beneficiary's position in the U.S. company meets the requirements for "executive capacity" in that he "is to direct both the management of the U.S. subsidiaries [sic] and the function of the U.S. entity; he establishes the goals and policies of the U.S. entity; he has the wide latitude in discretionary decision-making and is only follow [sic] the direction of the Board of Directors of the parent [company]."

Upon review, the AAO concurs with the director's conclusion that the petitioner has failed to establish that the beneficiary would be employed in the United States in a primarily executive or managerial capacity.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

As the director noted in the RFE, the petitioner's initial description of the beneficiary's job duties lacked specificity and failed to demonstrate what the beneficiary does on a day-to-day basis. The list contains vague and general phrases such as "confer with company officials to plan business objectives, to develop organizational policies to coordinate functions and operations between

divisions and departments, and to establish responsibilities and procedures for attaining objectives," "review activity reports and financial statements to determine progress and status in attaining objectives and revise objectives and plans in accordance with current conditions," and "direct and coordinate formulation of financial programs to provide funding for new or continuing operations to maximize returns on investments, and to increase productivity." It is not clear without further explanation what the company's "objectives" or "plans" are, or what the beneficiary actually does towards "attaining [such] objectives," or what is involved when the beneficiary is said to "direct and coordinate formulation of financial programs." The general phrases used by the petitioner do not shed light on what the beneficiary actually does on a day-to-day basis within the company. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

To address the deficiency in the initial petition, the petitioner was asked to provide a more detailed list of the specific day-to-day duties of the beneficiary, including an estimate of the percentage of time spent on each individual task at the beneficiary's job in the U.S. company. However, the petitioner failed to provide any further detail or explanation regarding the beneficiary's stated job duties, and instead repeated the job description previously given. The petitioner's additional disclosure that the beneficiary spends "95% of his total working hours in planning, developing, and establishing policies" and "about 10% working hours in administrative activities, e.g. training, hiring and firing employees of the U.S. company" is too vague and fails to show what the beneficiary actually does on a day-to-day basis. The evidence requested in the RFE is critical as it would have established what the beneficiary actually does within the company, and thus would enable U.S. Citizenship and Immigration Services (USCIS) to determine whether he indeed functions in a primarily executive capacity as claimed. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. *See* 8 C.F.R. § 103.2(b)(8). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Counsel's claim on appeal that the beneficiary's job duties meet the requirement for "executive capacity" is not persuasive. The AAO notes counsel's assertion that the petitioner's use of "statutory language [in the job description] should not be a ground for denial if the language in question clearly explains the beneficiary's responsibilities." However, as noted above, the petitioner failed to supplement the statutory language in the beneficiary's job description with details that clearly explain the beneficiary's day-to-day job responsibilities. In claiming that the beneficiary functions in an executive capacity, counsel also did no more than stating the statutory definition of the term "executive capacity" and asserting that it represents the beneficiary's job duties. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin*

Bros. Co., Ltd. v. Sava, 724 F. Supp. 1108; *Avyr Associates Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

Further, the statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-operations of the enterprise.

Here, the record does not demonstrate that there is a subordinate level of managerial employees under the beneficiary's direction. Although the beneficiary's four subordinate employees all have managerial titles, the record does not show that they actually function in a managerial or supervisory capacity. For example, although the job description for the Sales Dept. Manager, a direct subordinate of the beneficiary, states that he "establish[es] training programs for sales representatives" and "analyze[s] sales statistics gathered by staff," there is no evidence in the record that the company has sales representatives or any sales staff other than this employee. The duties of the General Operations Manager, the other direct subordinate of the beneficiary, include "direct[ing] and coordinate[ing] activities of businesses concerning purchasing textile raw material from the U.S. cotton seller and importing garment products" and "manag[ing] the movement of goods and product into and out of production facilities. Again, the record lacks any evidence that there is additional staff to assist this employee with these purchasing and distribution functions. The record does not indicate how much of the General Operations Manager's time is occupied with these purchasing and distribution functions, but if he is primarily performing these tasks that are necessary to produce or provide the company's products or services, he is not considered to be primarily functioning in a managerial capacity. See *Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

Similarly, there is no evidence that the Customer Service Dept. Manager and the Financial and Accounting Dept. Manager supervise or manage any other employees, or otherwise function in a managerial capacity. The job description for the Customer Service Dept. Manager indicates that this employee acts primarily as a customer service representative. The description of the duties of the Financial and Accounting Dept. Manager as "plan[ing], direct[ing], and coordinate[ing] accounting,

investing, banking, insurance, securities, and other financial activities *of a branch, office, or department of an establishment*" [emphasis added] appears to be a generic job description for that job title rather than a description of the duties of this particular employee in this particular company.

An employee will not be considered to be a supervisor simply because of a job title, because he or she is arbitrarily placed on an organizational chart in a position superior to another employee, or even because he or she supervises daily work activities and assignments. Rather, the employee must be shown to possess some significant degree of control or authority over the employment of subordinates. Given the size and nature of the vaguely described garment business, it is more likely than not that the beneficiary and his proposed subordinate employees will all primarily perform the tasks necessary to the operation of the business. *See generally Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313 (9th Cir. 2006). Therefore, it appears that the beneficiary will be, at most, a first-line supervisor of non-professional employees. A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor. *See* 101(a)(44) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604.

In light of the foregoing, the AAO finds the record is insufficient to establish that the beneficiary would be employed in a primarily executive or managerial capacity in the United States. For that reason, the petition will be denied.

Beyond the decision of the director, the AAO finds the evidence is insufficient to establish that the petitioner has a qualifying relationship with the beneficiary's foreign employer. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (*i.e.*, a U.S. entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." *See generally* § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C); *see also* 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary").

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between the U.S. and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593; *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

In its March 14, 2007 letter, the petitioner claimed that it is a subsidiary of Shandong D&Y Textile & Garment Group (SDYTG Group), a company located in Shandong, China. The petitioner submitted a copy of a stock certificate number 1, dated February 18, 2005, certifying that "Shandong Daiyin Textile Group Share Co. Ltd." (SDYTG Share), which the petitioner claims to be the same entity as SDYTG Group, owns 1,000,000 of the U.S. company's shares, representing all of the

company's authorized shares, according to the stock certificate. The petitioner also submitted a copy of its stock transfer ledger showing that certificate number 1 is the only issuance of the company's shares. In addition, the petitioner submitted a copy of a "Unanimous Written Consent of Board of Director to Corporate Action," dated January 28, 2005, confirming the issuance of 1,000,000 of the company's shares to SDYTG Share for the consideration of \$150,000.

With respect to the beneficiary's foreign employer, the petitioner claimed in its March 2007 letter that the beneficiary's most recent position outside the United States was as the general manager of two of SDYTG Group's subsidiaries, D & Y Imports and Exports Co. Ltd. (D&YIE) and Leinuo Apparel Co. Ltd. (Leinuo). However, the record lacks sufficient evidence demonstrating that these two companies are subsidiaries of the petitioner's parent company, and therefore affiliates of the petitioner, as claimed. The petitioner submitted an organizational chart for SDYTG Share listing the beneficiary as general manager for D&YIE and Leinuo. In addition, the record contains a brochure for SDYTG Group with photographs and names of the companies that are purportedly part of the Group, including the U.S. company, D&YIE and Leinuo. However, there is no documentation in the record that actually confirms or sets forth the details of the ownership and control of the beneficiary's foreign employers. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

In light of the lack of evidence relating to the ownership and control of the beneficiary's foreign employers, the AAO finds the petitioner has failed to establish that there exists a qualifying relationship between the U.S. company and the beneficiary's claimed foreign employers. For this additional reason, the petition will be denied.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.